Competition Law and Consumer Protection Law:
Two Wings of the Same House

by

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It is increasingly evident that the competition and the consumer protection missions of the Federal Trade Commission are more closely related than people have been accustomed to think. It is, therefore, fitting that this panel on the integration of the two missions has been included in the program that celebrates the 90th anniversary of the Federal Trade Commission.

In the early years of the Commission's existence, the link between deception of consumers and adverse competitive effects was taken for granted, although there appeared to be some confusion about which was the primary and which was the secondary concern. In 1922, for example, the Supreme Court suggested that the injury to competitors was the ultimate issue, *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 993 (1922) (". . . when misbranded goods attract customers by means of the fraud which they perpetuate, trade is diverted from the producer of truthfully marked goods"). Eight years later, the Supreme Court seemed to suggest the opposite, *FTC v. Klesner*, 280 U.S. 19, 25 (1929)(". . . the purpose must be protection of the public. The protection thereby afforded to private persons is the incident") Then, just one year later, the

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Court apparently flipped again in the landmark case of *FTC v. Raladam Corp.*,[2] 283 U.S. 643, 649 (1931), when it held.

> " . . . [T]he trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be lessened . . . . [I]t is against that condition of affairs, and not some other, that the Commission is authorized to protect the public."

The *Raladam* case, of course, provided the impetus for the 1938 Wheeler-Lea amendments,[3] which added the "deceptive acts or practices" language to Section 5, in order to make clear that proof of injury to competitors was not an essential element of the offense. Since that time, competition jurisprudence and consumer protection jurisprudence seem to have evolved along different paths and, until recently, the two responsible bureaus in the Commission seemed isolated from one another. This divergence was not inevitable. The mere fact that proof of direct consumer injury, without more, has been enough to support a consumer protection case does not mean that consumer protection offenses are matters of no competitive significance. Moreover, since post-*Sylvania*[4] case law makes it clear that competition analysis should focus on how consumers are affected, rather than on how individual competitors are affected, it is questionable whether the *Raladam*/Wheeler-Lea history has much ongoing relevance.

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[2] A case which, by the way, involved deceptive claims about an "obesity cure." Some things never change.

[3] Codified in 15 U.S.C. § 45(a)(1994).

[4] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

As I have said before,[5] both competition law and consumer protection law deal with distortions in the marketplace, which is supposed to be driven by the interaction between supply and demand. Antitrust offenses, like price fixing or exclusionary practices, distort the supply side because they restrict supply and elevate prices. Consumer protection offenses, like deceptive advertising, distort the demand side because they create the impression that a product or service is worth more than it really is. In other words, both sets of offenses can be analyzed in economic terms, and appreciation of this nexus will help to resolve some apparent tensions.

Consider, for example, the issues in a case like *California Dental*,[6] which Bob Skitol discussed in his paper for this session. Assume hypothetically that the respondent Association had adopted an advertising code that was more narrowly tailored to address information disparities between professionals and their customers, and assume further that the code had been enforced consistently as written. The conflict between what have long been considered competition law objectives and consumer protection law objectives would then have been squarely presented.

There is, however, nothing unusual about the need to balance objectives that tug in opposing directions. When deciding antitrust cases today, we take it for granted that it is appropriate for a fact-finder to consider the potential for greater interbrand competition when

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[5] Thomas Leary, Self Regulation and the Interface Between Consumer Protection and Antitrust, *available at* <http://www.ftc.gov/speeches/leary/040128deweyballantine.pdf>.

[6] *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

evaluating a vertical restraint on intrabrand competition. Why should it be any less appropriate to consider the potential for more accurate demand-side responses when evaluating a supply-side restraint? A balancing test of this kind could justify a collective media response to the Commission's recent suggestion that the media reject advertisements of blatantly false weight loss claims.[7] Of course, it may not be possible to balance the supply-side effects and the demand-side effects in a rigorous way, but we do not know how to rigorously balance interbrand and intrabrand effects either. (In fact, courts generally do not even try but simply assume that interbrand effects are more important.[8]) However, since the sale of patently worthless products confer no competitive benefits whatever, the balance should be easy to strike. It does not take much to outweigh a zero.

There is also an interesting parallel between competition law and consumer protection law that relates to pleading and proof. In competition law, we are all familiar with the traditional

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[7] *See* Deception In Weight-Loss Advertising Workshop: Seizing Opportunities and Building Partnerships to Stop Weight-Loss Fraud, A Federal Trade Commission Staff Report, December, 2003, *available at* <http://www.ftc.gov/os/2003/12/031209weightlossrpt.pdf> (encourages the media to refuse to publish advertising with certain false weight loss claims). Weight-loss advertising is not the only area where the Commission has been permissible toward collective action. S*ee also* Letter to Jerald A. Jacobs, Shaw Pittman LLP, from Alden F. Abbott, Assistant Director for Policy & Evaluation, Bureau of Competition, FTC, dated January 29, 2004, *available at* <http://www.ftc.gov/os/2004/01/040129eraopinion.pdf> (stating that, in staff's opinion, no challenge is warranted against the Electronic Retailing Association's proposal to review infomercials and other advertising that contain claims that appear on their face to be unreasonable or incapable of substantiation).

[8] *Continental T.V.*, 433 U.S. at 52.

distinction between so-called "*per se*" cases and "rule-of-reason" cases.[9] In a *per se* case, the only issue is whether the conduct occurred, and proof of adverse market effects is unnecessary. In a rule-of-reason case, it is necessary to prove adverse market effects, and conduct may be defended on the ground that adverse effects are outweighed by beneficial ones. This distinction does not mean, however, that *per se* cases are in an entirely separate category; agreements that are illegal *per se* could also be condemned under a "rule-of-reason,"[10] but there is no reason to plead them that way when adverse effects can be conclusively presumed.

There is a similar structure in consumer protection law. A practice is "deceptive" if it misleads reasonable consumers and is likely to affect their purchase decision.[11] The qualifiers merely go to the definition of deception, however, not to the overall effects of the harm. In this respect, deception offenses are treated like *per se* offenses, because definition can be outcome-determinative. On the other hand, the Commission's governing statute says that a practice is "unfair" only if the resulting consumer injury is "substantial," the injury is not reasonably

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[9] Actually, I believe this traditional distinction has become blurred, and today it is more accurate to refer to the contrast between cases that focus on the nature of the restraint and cases that focus on the nature of the market. *See* Thomas Leary, A Structured Outline for the Analysis of Horizontal Agreements, *available at* <http://www.ftc.gov/speeches/leary/chairshowcasetalk.pdf>. This restatement does not affect the point I want to make about parallels.

[10] The distinction between reasonable and unreasonable restraints dates from *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); the subset of restraints that are unreasonable *per se* was not clearly delineated until *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

[11] *See* Deception Policy Statement in *Cliffdale Associates, Inc*., 103 F.T.C. 110, 168-70 (1984).

avoidable, and it is not offset by countervailing benefits.[12] This looks like a rule-of-reason inquiry into such matters as the magnitude of the impact, the availability of alternatives and offsetting efficiencies. If we pursue the parallel further, we could conclude that deception and unfairness are not separate categories either; deceptive practices are unfair practices, as well, but it is not necessary to plead them that way when a simpler line of proof is available.[13]

In this respect, the analogy with competition law helps us to think more clearly about consumer protection law. Insight can also flow in the opposite direction, a fundamental point that is emphasized in the Averitt and Lande paper[14] prepared for this program. Antitrust lawyers tended to focus on restraints that affect price (and output) - - in part, because these may historically have been the most significant variables and, in part, because they are the easiest to quantify. Consumer protection lawyers, on the other hand, are keenly aware of the fact that price is just one consideration among many. Some consumer protection cases do indeed focus on matters of price - - when, for example, the Commission brings cases based on hidden charges or the practice of debiting accounts without a customer's permission. The bulk of the consumer

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[12] *See* 15 U.S.C. § 45 (n).

[13] I am indebted to Howard Beales, recently Director of the Bureau of Consumer Protection, for this insight. *See* J. Howard Beales, Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present, *available at* <http://www.ftc.gov/speeches/beales/040802adstokids.pdf>. *See also FTC v. Int'l Harvester Co.* 104 F.T.C. 1050, 1064 (1984) (. . . deception is one specific but particularly important application of unfairness.).

[14] Neil W. Averitt and Robert H. Lande, Consumer Choice: Operationalizing A New Paradigm of Antitrust Law (draft in progress).

protection cases, however, are based on or include non-price deceptions like unsubstantiated performance claims.

Consumer protection law also reflects a special concern about sales to children or to other people who, for one reason or another, are particularly vulnerable buyers. This particular solicitude may have once been prompted by paternalistic sentiments, but it is not inconsistent with the structure outlined above. The Commission takes particular vulnerabilities into account in its determination of whether a message is likely to deceive - - and thus to cause a demand-side distortion. This is an economic concept.

There are also a few cases predicated on the theory that a non-deceptive message is unfair if it promotes an illegal transaction, like the purchase of cigarettes by minors.[15] In this situation, the substantial nature of the consumer injury has been determined by a legislative body, children may not be capable of reasonable avoidance, and there are no countervailing benefits. These cases are rare because many legitimate promotions have some spillover effects on children but, if the effects are substantial, the case may be hard to defend.

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[15] *R.J. Reynolds Tobacco Company*, 127 F.T.C. 49 (1999)(*dismissed without prejudice on other grounds*). *See also, FTC v. Jeremy Martinez* (C.D.Ca 2002) (action against seller of bogus driver's licenses and birth certificates), a*vailable at* <http://www.ftc.gov/os/2000/12/martinez.pdf>.

A very different question would be presented if the Commission attempted to attack as unfair the non-deceptive promotion of perfectly legal transactions that some may nevertheless believe are socially undesirable. There is no chance that the Commission will go down this road at the present time.[16] There is a difference, however, between an affirmative use of the Commission's unfairness authority and toleration of collective industry actions to address various social problems. For example, we have recently encouraged collective action to help ensure that minors are not exposed to adult films or recordings that the industry rates as unsuitable, even though sales to minors are not illegal.

If the promotions are not deceptive, there is no demand-side distortion, and therefore, it is not possible to employ the economic balancing tests outlined above. There may, of course, be negative economic externalities[17] associated with transactions of this kind. Examples might be the burden of increased healthcare expenditures, even if "unhealthy" foods are advertised non-deceptively, or the consequences of possible anti-social behavior by minors exposed to unsuitable entertainment. Normally, however, anticompetitive industry action cannot be justified on the ground that it will reduce negative externalities. I doubt that exhibitors of R-

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[16] Commission initiatives in this area twenty five years ago created the famous "Kidvid" controversy and led to a hasty retreat. *See* Beales, *supra* n.13 pp. 5 *et seq.*

[17] I believe that there also are negative externalities associated with deceptive advertising in our society. It not only diverts sales from honest competitors but also contributes to a pervasive consumer cynicism that affects the credibility of all advertisers, whether they are direct competitors or not. Honest advertisers have to spend more money to overcome this cynicism. But, externalities are normally not considered when more direct anticompetitive effects can be observed.

rated films could defend a price-fixing conspiracy on the ground that they want to price minors out of the market.

There may, nevertheless, be a narrow exception to that general rule for precisely targeted restraints that reduce negative externalities and that do not appear to be commercially motivated. A price-fixing agreement on R-rated films would fail because it is not targeted and because it has an obvious commercial purpose. A collective agreement not to advertise these films in certain venues, or to require that exhibitors more closely monitor admissions, could pass muster. Similarly, an agreement among competitors not to promote or sell junk food in school settings might be defensible.[18]

Conclusion

This brief paper is intended merely as an introduction to a fascinating subject that has been neglected for too long. I anticipate that the Commission's program on the interface between competition law and consumer protection law will enrich our understanding and stimulate further discussions and research.

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[18] In *United States v. Brown Univ.*, 5 F.3d 658, 677 (3rd Cir. 1993), the court emphasized that the benefits of agreements on student aid could be described in economic terms and that, in any event, the universities did not have "a strong economic self-interest." *Compare FTC v. Superior Trial Lawyers Ass'n*, 493 U.S. 411 (1990), which condemned a boycott *per se*, when the participants hoped to gain financially, even though they also advanced other non-commercial objectives.